FILE COPY

Office Supreme Court, U.S.
FILED
SEP 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 402

UNITED STATES OF AMERICA and JACK ALOFF,
Petitioner,

vs.

JAY ASTER, Individually and Trading as WINGATE CONSTRUCTION CO., NATIONAL SURETY CORPORATION and THE CROUSE-HINDS CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JACK ALOFF,
7338 Brockton Road,
Philadelphia 31, Pa.,
Relator.

Martin & Tyle, 1025 Bankers Securities Bldg., Phila. 7, Pa.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
Reasons for Allowing the Writ	8
Conclusion	10

APPENDIX:

Opinion of the United States District Court for the Eastern District of Pennsylvania, 176 F. Supp. 209, Petitioner's Exhibit A	11
Opinion of the United States Court of Appeals for the Third Circuit, 275 F. 2d 281, Petitioner's Exhibit B	14
Petitioner's Exhibit C	18
Opinion Sur Petition for Rehearing of United States Court of Appeals for the Third Circuit, Petitioner's Exhibit D	29
Petitioner's Exhibit E	30
Petitioner's Exhibit F	32

INDEX

CASES CITED

	PAGE
U. S. ex rel. Bayarsky v. Brooks, C. A. 3 (N. J. 1954) 210 F. 2nd 257	8
U. S. ex rel. McCans vs. Armour and Co., D. C. D. C. (1956), 146 F. Supp. 546, affirmed 254 F. 2nd 90, 102 U. S. App. D. C. 391	8
U. S. ex rel. Sherr vs. Anaconda Wire and Cable Company, D. C. N. Y. 1944, 57 F. Supp. 106, affirmed 149 F. 2d 680, certiorari denied 66 S. Ct. 143	8

STATUTES CITED

28 U. S. C. Section 1254 (1)	2
False Claims Act, 31 U. S. C. §232(A), (B), (C)	3

RECORD CITED

89 Congressional Record 10744-52	10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No.

UNITED STATES OF AMERICA and JACK ALOFF,
Petitioner,

vs.

JAY ASTER, Individually and Trading as WINGATE CONSTRUCTION CO., NATIONAL SURETY CORPORATION, and THE CROUSE-HINDS CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petition of the United States of America and Jack Aloff alleges:

OPINION BELOW.

The order sought to be reviewed was made by the United States Court of Appeals for the Third Circuit and entered on February 17, 1960 (Petitioner's Exhibit B). On June

16, 1960, the United States Court of Appeals for the Third Circuit entered the following order:

> "The pages submitted by appellant, Jack Aloff, are accepted as a petition for rehearing and, under the circumstances, as within time. The petition for rehearing is denied." (Petitioner's Exhibit D.)

The opinion of the United States Court of Appeals for the Third Circuit and the decision of the United States District Court reviewed by the Court of Appeals are officially reported. *U. S. ex rel. Jack Aloff v. Jay Aster, et al.*, 176 F. Supp. 209, 275 F. 2d 281.

JURISDICTION.

Jurisdiction to review in the manner set forth herein is granted this Court by 28 U. S. C. Section 1254(1). Jurisdiction of the District Court is claimed under the False Claims Act 31 U. S. C. §232(A), (B); (C).

QUESTIONS PRESENTED.

The questions presented for review are as follows:

(a) Whether the Attorney General of the United States at Washington, District of Columbia, under the provisions of the False Claims Act 31 U. S. C. §232(C) has the right to determine if the person bringing the suit has met the jurisdictional requirements of the statute?

(b) Whether a United States District Court has the right to refuse to hear, try and determine a Qui Tam action after the Attorney General at Washington, District of Columbia,

has made the decision that the person bringing the action has met the jurisdictional requirements of the statute, and where the Attorney General, within sixty days after service of the required disclosure has declined to enter the action under the authority contained in the provisions of 31 U. S. C. §232(C)?

(c) Whether the portion of section 232 (C) stating that "The Court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought," means information which was original with the United States of America, and not original with the informant?

STATUTES INVOLVED.

The relevant sections are:

False Claims Act 31 U. S. C. Section 232(A):

> "The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit."

False Claims Act 31 U. S. C. Section 232(B):

> "Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at

the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent."

False Claims Act 31 U. S. C. Section 232(C):

"Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States Attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the Court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit

brought under clause (B) or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: Provided, however, That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

STATEMENT OF THE CASE.

On August 18, 1958, the petitioner, Jack Aloff, brought an action in Qui Tam, in his name as well as in the name of the United States of America, against Jay Aster, Individually and doing business as the Wingate Construction Company, the National Surety Corporation and the Crouse-Hinds Company, under the provisions of Title 31 U. S. C. sections 231-233 and 235.

The complaint charged the respondents with having conspired to defraud the United States Government through the furnishing and installation of wrong materials under Contract No. DA-36-109-Eng-6543 between the United States Government and Wingate Construction Company of Philadelphia, Pennsylvania, providing for the construction of a swimming pool and bathhouse at McGuire Air Force Base, New Jersey. The respondents knew that certain of the materials furnished and installed were in violation of the plans and specifications of the said contract, were contrary to Federal Laws pertaining to the National Bureau of Standards and Federal Laws pertaining to the General Services Administration, and were contrary to the specified

requirements of the Department of the Army. The complaint also charged that the respondents conspired to deprive the United States of the monetary value of tests required by the contract specifications in question. The complaint further charged that the respondents presented false and fraudulent claims to the United States Government upon which the Government relied in making disbursement of substantial sums of money to the Wingate Construction Company.

All three respondents appeared through counsel and filed an answer to petitioner's complaint in due season.

On November 4, 1958, the Attorney General of the United States, at Washington, District of Columbia, determined that when the relator brought the suit under clause (B) of section 232 of the United States Code, Title 31, the relator had given notice of the pendency of his suit to the United States by serving upon the United States Attorney for the District in which such suit was brought a copy of the bill of complaint, and had sent, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of his bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of his suit, and also determined that the relator's suit was not based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time the suit was brought.

These determinations resulted in the sending of a letter dated November 4, 1958, by the United States Department of Justice, Washington, District of Columbia, to the relator stating, in part:

> "Enclosed is a copy of the disclosure you submitted to us, pursuant to section 231 and 232 Title 31 of the United States Code. While your handwritten disclosure was for the most part legible, there may be a few minor errors in this copy. As indicated the disclosure satisfies the jurisdictional requirements of the statute and apprises us of the nature of your contentions.

"Under separate cover we are returning the documentary evidence submitted in support of your allegations." (Petitioner's Exhibit E.) p. 31.

On December 8, 1958, United States Attorney Harold K. Wood and Assistant United States Attorney Charles M. Donnelly, in a Statement to the Court, said that after a thorough investigation of the facts in the above entitled matter the United States of America declined to enter the action under the authority contained in the provisions of 31 U. S. C. §232(C). (Petitioner's Exhibit F.) p. 32.

On December 22, 1958, the respondents filed a motion and notice of motion to dismiss the action.

On December 29, 1958, the petitioner, Jack Aloff, filed an answer to respondents' motion to dismiss, together with a copy of notice of such answer to counsel for all respondents.

On May 11, 1959, the complaint was dismissed in the United States District Court for the Eastern District of Pennsylvania (Petitioner's Exhibit A) p. 11, because:

". . . In these circumstances this court finds no justification for a reading of the statute as narrower than it appears on its face . . . The motion to dismiss will be granted."

On February 17, 1960, the United States Court of Appeals for the Third Circuit affirmed the order of dismissal. p. 14.

On May 30, 1960, correspondence was mailed by the petitioner, Jack Aloff, to the Honorable Justice Biggs, Chief Judge of the United States Court of Appeals for the Third Circuit, setting forth facts material to the consideration of the questions presented. (Petitioner's Exhibit C.) p. 18.

On June 16, 1960, the correspondence of May 30, 1960, was accepted by the United States Court of Appeals for the Third Circuit as a Petition for Rehearing, which petition was denied. p. 29.

The basis for Federal jurisdiction in the Court of first instance is Section 232(A) of the False Claims Act Title 31 U. S. C.

REASONS FOR ALLOWING THE WRIT.

1. The decision of the Court below is in conflict with the decisions of the Courts of Appeals of other circuits.

In one court it was held that the amendment to section 232, dated December 23, 1943, had for its purpose, inter alia, the exclusion of "parasitical claims", where the information was not original with the informer, and where the information was acquired in government service. *U. S. ex rel. McCans vs. Armour and Co.*, D. C. D. C. (1956), 146 F. Supp. 546, affirmed 254 F. 2nd 90, 102 U. S. App. D. C. 391.

In *U. S. ex rel. Sherr vs. Anaconda Wire and Cable Company*, D. C. N. Y. 1944, 57 F. Supp. 106, affirmed 149 F. 2d 680, certiorari denied 66 S. Ct. 143, it was held that the purpose of section 232, as enacted in 1943, was to eliminate the former practice by which many persons filed suits based on information and alleged facts obtained bodily from indictments returned in the United States Courts, from newspaper stories and from Congressional investigations without basis of any original information in the possession of the informer. Here again the stress is upon the fact that the information must originate with the informer.

2. The Court of Appeals below has rendered a determination in conflict with its own previous determination.

In *U. S. ex rel. Bayarsky vs. Brooks*, C. A. 3 (N. J. 1954), 210 F. 2nd 257, it was held that the purpose of the amendment of section 232 was to stamp out the practice of would-be informers basing civil suits on information taken from pending Federal criminal prosecutions. Here again the information was already in the possession of the United States before the suit in Qui Tam was filed, and was not original with the informer.

All of the information contained in the suit filed by the petitioner, Jack Aloff, and contained in any disclosure to the Attorney General of the United States at Washington,

District of Columbia, as required by section 232(C) of 31 U. S. C. was original with the petitioner, Jack Aloff. This was confirmed by the opinion of the Court of Appeals for the Third Circuit which stated: "The information was given by the informant to the government . . ."

3. No interpretation of the amendment of section 232 of 31 U. S. C., dated December 23, 1943, has ever been made by the United States Supreme Court involving the important questions of Federal Law raised by this petitioner. A Qui Tam action is not an action that must be confined to one particular district. It can be, and often is, national in scope, as shown by the disclosure of the petitioner, Jack Aloff, to the Attorney General at Washington. Because of the absence of such interpretation the United States of America may be deprived of receiving just value for moneys it may expend, or may have expended. Therefore, this Court, the Supreme Court of the United States, should interpret the amendment of December 23, 1943, to section 232 of 31 U. S. C. so that all the District Courts and Circuit Courts of Appeal in the United States may be guided to rule in uniformity.

The United States Court of Appeals for the Third Circuit, in its opinion filed February 17, 1960, and the United States District Court for the Eastern District of Pennsylvania, in its opinion filed May 11, 1959, ignored the determination of the United States Department of Justice that the "informant" had met the jurisdictional requirements of the statute. This right of determination is given the Attorney General at Washington, District of Columbia, in section 232(C) of 31 U. S. C. The United States Government by its Attorney Harold K. Wood, and its Assistant Attorney Charles M. Donnelly, declined to enter the action under the authority contained in the provisions of section 232(C) of 31 U. S. C., thus permitting the relator, Jack Aloff, to carry on the suit. This is also in conformity with section 232(C) of 31 U. S. C. At no place in this Statement to the Court did the United States of America, through its attorneys, state that the suit was without merit.

The District Court for the Eastern District of Pennsylvania referred in its opinion to the Congressional Record governing this statute. A reading of the 89 Cong. Rec. 10744-52 appears to reveal an intent of Congress to rely upon the judgment of only the Attorney General of the United States at Washington, District of Columbia, with its broad investigative facilities, as to whether or not an "informant" has met the jurisdictional requirements of the statute.

Further, the Congressional Record appears to reveal that the intent of Congress was not to abolish the Qui Tam action as a remedy of false claims.

4. The public interest requires a determination by this Court of the questions herein involved. There are many instances wherein not only the United States Government is deprived of receiving just value for moneys expended, but wherein the safety of the public is jeopardized by the failure of government contractors to carry out their contractual obligations.

Unless a citizen, who has knowledge of such conspiracies and failures to carry out such contractual obligations, is permitted to act, the public may be harmed. The violations which may be perceived by a private citizen may not be ascertainable by the public official due to his manifold and demanding duties which may prevent him from making an exhaustive study.

The statute obviously sought to encourage the private citizen to act as a guardian of the interest of the public at large.

CONCLUSION.

For the foregoing reasons, on behalf of the United States of America and myself, I respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK ALOFF,
Relator.

EXHIBIT A.

IN THE

UNITED STATES DISTRICT COURT.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES OF AMERICA and JACK ALOFF, petitioners v. JAY ASTER, Individually and Trading as THE WINGATE CONSTRUCTION COMPANY and THE NATIONAL SURETY CORPORATION and THE CROUSE-HINDS COMPANY	Civil Action. No. 25207.

OPINION.

By HASTIE, *Circuit Judge.* (Filed May 11, 1959)

At issue here is a motion of the defendants to dismiss this qui tam action brought by Aloff, an informer, pursuant to the False Claims Act, 31 U. S. C. §§ 231, 232, charging the defendants with having made false and fraudulent claims against the United States in connection with the supplying and installing of certain materials under public contracts. The United States did not initiate this action and has not joined in it. Documentary evidence supporting the present motion includes a detailed eight page statement of the factual basis of the present claim which admittedly was

submitted by Aloff to the Department of Justice several months before the present suit was filed. Thus, the present record shows and this court now finds that the essential information upon which the present suit is predicated was supplied to and was in the possession of the United States before this suit was filed. The question of law to be decided is whether in these circumstances the present suit is barred by the provision of Section 232 of Title 31 that "(t)he court shall have no jurisdiction to proceed with any such suit . . . brought under this section whenever it shall be made to appear that such suit was based upon evidence in the possession of the United States, . . . at the time such suit was brought. . . ." On its face this language is comprehensive. It is broad enough to cover information obtained by the government from any source whatever. However, the plaintiff argues that the sense and purpose of this statutory restriction dictate an implied exception of information supplied by the very informer who later brings the suit after the government has refused to do so.

This argument is predicated upon the assertion that the statutory language in question was enacted to correct the situation presented by the well known case of *United States ex rel. Marcus v. Hess*, 1943, 317 U. S. 537, where an informer, using evidence collected by the government and obtained by him from public sources enriched himself by instituting and successfully contesting a qui tam action. But though this occurrence apparently was the stimulus which caused the executive branch of the national government to recommend that Congress enact remedial legislation, it does not follow that the amendatory provision either as proposed or as enacted was limited to this situation. Indeed, the history of this legislation, conveniently summarized in *United States v. Pittman*, 5th Cir. 1945, 151 F. 2d 851, shows that the bill introduced upon recommendation of the Attorney General and actually passed by the House of Representatives provided for the total abolition of the informer's qui tam action as a remedy for false claims. However, the Senate approached the matter quite

differently and completely rewrote the bill to allow an informer to sue if his action was predicated upon information original with him and if the Attorney General had declined to act after receiving that information. Neither house of Congress would accept the other's bill, so the matter went to conference where the present rather different form of the legislation was devised. Particularly noteworthy is the debate which ensued in the Senate where Senator Langer vigorously attacked the conference compromise as practically abolishing the qui tam procedure and proposed resubmission of the matter to the conference committee with instructions that the Senate conferees insist that only the parasitical action of the relator who uses public information as the basis of his suit—the situation of *Marcus v. Hess*—should be abolished. 89 CONG. REC. 10746-51. However, the Senate rejected this motion and adopted the conference report. 89 CONG. REC. 10752.

In these circumstances this court finds no justification for a reading of the statute as narrower than it appears on its face. Accordingly, Section 232 of Title 31 United States Code is construed as prohibiting any qui tam action based on information already in the possession of the United States, regardless of the source from which that information has come.

The motion to dismiss will be granted.

ORDER.

AND NOW, to wit, this 11th day of May, 1959, after hearing on the defendants' motion to dismiss the complaint and pursuant to the opinion of the court, it is hereby

ORDERED that the complaint herein be and it is hereby dismissed.

(Sgd.) WILLIAM H. HASTIE,
Circuit Judge.

EXHIBIT B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,970

THE UNITED STATES OF AMERICA AND JACK ALOFF,

Appellant,

v.

JAY ASTER, INDIVIDUALLY AND TRADING AS WINGATE CONSTRUCTION CO., NATIONAL SURETY CORPORATION AND THE CROUSE-HINDS CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 20, 1959

Before BIGGS, *Chief Judge*, and GOODRICH and MCLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT.

(Filed February 17, 1960)

By McLAUGHLIN, *Circuit Judge.*

This is an appeal from a dismissal of a qui tam or informer's action brought under 31 U.S.C. §§231, 232, 233 and 235.

The district court found that the essential information upon which the suit was predicated was in the possession of the United States prior to the filing of the suit. Such information was given to the government by the informer who now brings this claim. The court construed Section 232(C) as depriving it of jurisdiction of any qui tam action based on information already in the hands of the United States regardless of the source of that information.

Appellant asserts that he had been merely trying to inform the United States of violations of law by the defendants and that "His depositions clearly indicate * * *" this. Actually, in appellant's deposition which he does not print and which was taken a month after he had commenced the present suit, appellant testified that first, he turned over all the information he had up to over a year prior to the date of the deposition to the Inspector General's Division of the Corps of Engineers at Fort Belvoir, Virginia. And the information he acquired after that as he said, "we turned that over to the Justice Department in Washington * * *. During the past five or six months." He was asked, "Have you made a fair disclosure to the government of all the facts on which you rely in making that contention (his claim that either Wingate Construction or Crouse-Hinds or The National Surety Company had in any way defrauded the government). Appellant's answer to the question was "Fair, in my estimation."

In the light of the above direct, unequivocal testimony

of the appellant there was no dispute of fact here as to whether this informer had turned over all of his information to the government. In this case wherein he is the plaintiff he has sworn not that he just tried to but that he did. The district court had the right and the duty to so hold. The appellant complains of some early position taken by the Attorney General that the data submitted by Aloff "consists of generalizations and conclusions of law and that the informant has failed to submit factual evidence as required by said statute." That statement was made prior to the deposition referred to and whatever might be the worth of Aloff's information he has made it very clear in this suit that he furnished it to the government four or five months before he commenced his action.

Appellant's other point concerns the pronouncement in the ruling statute (31 U.S.C. §232(C)) that the district court has no jurisdiction to proceed in this type of suit if at any time during the proceeding:

> "* * * it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought * * *."

Appellant would add an exception to the above quoted law in effect reading "except where the informer who was the source of the evidence or information brings the action".

We find no merit in appellant's conception of the intent of Section 232(C). This section sets out in detail the method to be followed in bringing a qui tam action. Had Congress wished to provide an exception to the clause dealing with jurisdiction, or lack of jurisdiction, of the courts, it is reasonable to assume that it would have done so with the same care as found in the remainder of the section. The steps set forth require that when such cause is brought the relator shall serve a copy of the bill of complaint on the United States Attorney for the district in which suit is brought and mail a copy of the bill together with a written

disclosure of substantially all material evidence and information in the possession of the relator to the Attorney General of the United States. This presumes that the information has not already been made available to the government. The appellant here chose to impart his material information to the United States for its use rather than first bringing an action on his own initiative as provided for in Section 232(B). By so doing he has brought himself within the jurisdictional prohibition of Section 232(C).

The cases cited by appellant lend no support to his ingenious theory. In one of them, United States ex rel. McCans v. Armour & Co., 146 F. Supp. 546 (D.C. D.C. 1956), affd. 254 F. 2d 90 (D.C.App. 1958), the district court in dismissing a qui tam cause relied inter alia on the ground that "on occasions" prior to suit informant did "bring her claim * * * against defendant to the attention *. * *" of government officials.

Since the information was already in the hands of the United States, in accordance with the statute, the district court had no jurisdiction to proceed and properly dismissed the complaint on defendant's motion.

The order appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

EXHIBIT C.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THE UNITED STATES OF AMERICA and JACK ALOFF, *Appellant*, v. JAY ASTER, Individually and Trading as WINGATE CONSTRUCTION CO., NATIONAL SURETY CORPORATION, and THE CROUSE-HINDS COMPANY.	No. 12,970. Opinion filed February 17, 1960

To Honorable Justice Biggs, Chief Judge of The United States Court of Appeals for the Third Circuit.

Honorable Sir:

On May 9, 1960, the file in the above matter was returned to me by my counsel, and on May 24, 1960, I was informed by letter that my counsel "was no longer in the matter as counsel". Immediately upon receipt of the file I carefully examined the docket entries of the District Court, and found that the date when the deposition of myself, Jack Aloff, taken by the Crouse-Hinds Company, was not included among the entries made by the Clerk, but only included among the entries was the date when Notice of Intent to take such deposition was filed, and the date upon which the deposition was filed with the District Court.

On page 2, beginning with line 28, the Circuit Court, in its opinion, stated:

> "The appellant complains of some early position taken by the Attorney General that the data submitted by Aloff 'consists of generalizations and conclusions of law and that the informant has failed to submit factual evidence as required by said statute.' That statement was made prior to the deposition referred to . . ."

The sequence of events as they actually occurred is as follows:

On September 25, 1958, at 2 P. M., in the offices of F. Hastings Griffink Jr., Esquire, the deposition referred to was taken, but it was not filed with the District Court until November 19, 1958. On October 15, 1958, the United States Attorney filed with the Court the Statement To The Court stating among other things ". . . the information supplied by the informant consists of generalizations and conclusions of law, and that the informant has failed to submit factual evidence as required by said statute." This statement to the Court by the United States Attorney was attached to my Answer to Motion of Defendants To Dismiss, filed with the District Court by me on December 29, 1958, and marked Exhibit "A".

On October 29, 1958, I presented myself to the office of the Attorney General in Washington, upon written instructions from the United States Attorney on October 20, 1958, which stated in part ". . . We will therefore expect you to comply with your advice and proceed to Washington with the necessary information." On October 29, in Washington, I made a disclosure in writing of substantially all evidence and information in my possession material to the effective prosecution of the above-captioned suit. On November 4, 1958, I received a letter from the U. S. Attorney General, signed by the Chief of the Frauds Section, which stated in part ". . . As indicated the disclosure satisfies the juris-

dictional requirements of the statute and apprises us of the nature of your contentions." This letter was attached to my Answer To Motion Of Defendants To Dismiss the subject action and marked Exhibit "B".

The statement of the United States Attorney with reference to generalizations was made subsequent to the taking of the deposition.

Contained in the disclosure made to the Attorney General on October 29, 1958, were facts that had never been turned over by me to any government agency, Court of Law, or to the Attorney General's office prior to the taking of the deposition or the filing of the suit, and it also contained facts that were not a part of the eight pages filed by the Defendant, Crouse-Hinds, in its brief to the District Court—which eight pages were taken from a 35-page memorandum to which the Attorney General referred on October 15, 1958, as generalizations and conclusions of law.

The substantial and essential additional information given to the Attorney General on October 29, 1958, has never been filed with either the District Court or the Circuit Court of Appeals, nor was it contained in the eight pages submitted by Crouse-Hinds in their Brief in Support of Defendants' Motion to Dismiss.

A copy of what I gave the Attorney General on October 29, 1958, marked "Civil Action No. 25207, Proof of Allegations Contained Therein" is attached, and clearly shows the additional information.

May I respectfully ask the Court to please advise me of the following:

a. Whether the applicable portion of the opinion handed down on February 17, 1960, will be corrected to conform with the actual sequence of events;

b. Whether this correction will in any way change the opinion of the court;

c. Whether the opinion as it now stands covers the at-

tached information given the Attorney-General on October 29, 1958, or any portion thereof; and,

d. Whether, if correction is made to any part of the opinion; such correction would cover the attached "proof of allegations", or any portion thereof.

Respectfully yours,

Jack Aloff,
Relator

JA:A
Enclosure

COPY

Civil Action No. 25207
Proof of allegations contained therein

Answer to complaint filed September 22, 1958 with the Clerk of the U. S. District Court for the Eastern District of Pennsylvania by Jay Aster trading as the Wingate Construction Company and his attorney Joseph H. Lieberman admits contract No. DA-36-109-ENG-6543, dated December 7, 1956 between Wingate Construction Company and the U. S. Government for the construction of an officers swimming pool and bathhouse at the McGuire Air Force Base in the State of New Jersey. Amount of contract $229,693.70.

Paragraph 30 of said contract, pages 10 and 11, headed "Accident Prevention" requires compliance with manual "Safety requirements", 16 December, 1941. Pages 29 and 30 of said manual requires underwater floodlights to be of a type approved by the underwriters' Laboratories, Inc., or Factory Mutual Laboratories, while installation and maintenance of floodlights shall comply with the National Electrical Safety Code, etc.

Page 25-2 of the contract noted the National Electrical

Safety Code as the Handbook of the National Bureau of Standards.

Page 25-2, paragraph 25-03, makes the applicable Underwriters' Laboratories, Inc. Standard, a part of the contract, and provides for certified test reports of an independent testing laboratory.

Letter from Underwriters' Laboratories, Inc. dated May 2, 1957 contains that the Crouse-Hinds units are not listed as having been approved.

Paragraph GC-6 page II-3 of the contract requires equipment to conform to standard specifications on tests.

Paragraph 9, page 2 of the general provisions of the contract, prescribed by the General Services Administration, requires performance tests as described in the specifications.

Page 25-12 of the specifications requires that the reflector of the underwater floodlights shall be adjustable.

Page 2 of Exhibit "C", filed in the U. S. District Court by Wingate, makes a part of the record of this action, all the testimony transcribed by a court stenographer on November 18, 1957, November 25, 1957, December 2, 1957, December 9, 1957, and December 16, 1957.

Pages 107 and 108 of the notes of testimony show that the Divisional Manager for the Crouse-Hinds Company testified and admitted that their lights were not approved by the Underwriters.

Page 110 of the notes of testimony show that the said Divisional Manager testified that the lights that were shipped meet the requirements of the job specifications, with the one exception that they are not approved by the underwriters.

Page 117—the said Divisional Manager testified that Crouse-Hinds latest product did not correspond to specifications required under the Underwriters' Laboratories approval.

Pages 114, 118 and 119—The said Divisional Manager testified that the Crouse-Hinds fixtures had fixed reflectors, although the specifications required adjustable reflectors.

Page 136—The said divisional manager testified that the Crouse-Hinds illumination dept. makes changes on their own authority,

Page 139—The said divisional manager testified that the customer doesn't know what "C" means in a Crouse-Hinds catalogue cut, any more than the first man you see walking down the street.

Page 140—The said divisional manager testified that the customer was not told about variations made by Crouse-Hinds in the customer's order, if Crouse-Hinds regarded the variation as not being major. Drawing number 934-GH18, made a part of the record in this case, shows changes made by Crouse-Hinds on 5-11-54, 6-29-54, 9-7-55, 10-10-55, 11-25-55, 1-24-56, 9-14-56, 3-11-57.

Page 126—Mr. Guertler, of Crouse-Hinds, read into the record that the swimming pool lights were in accordance with the Corps of Engineers' specifications, etc.

Page 127—Mr. Guertler admitted this letter isn't accurate.

Page 127—Mr. Guertler testified that Model D was installed in the pool. The Crouse-Hinds Company packing list and notice of shipment =F81450 listed the shipment as Model C.

Page 132 and 133—Mr. Miller, divisional manager at Crouse-Hinds admitted that the contents of the letter that he dictated to Jay Aster on May 24, 1957 are not correct.

Daily Progress Report dated 5-29-57, signed by Hickey, Foreman for Wingate, bears statement by Hickey that Lt. Williams noted his approval on a copy of the letter from Crouse-Hinds to Jay Aster. Said report also notes that M. Benjamin has promised to have an electrical foreman on the job on Friday to start work and to deliver 12 underwater pool floodlights to the job the same day.

Page 288—Jay Aster testified that the story related by both Mr. Miller and Mr. Guenther, at Crouse-Hinds, was substantially a correct one.

Page 365—Jay Aster admitted he was told about the lights and the drawings being different.

Page 378, 379—Jay Aster admitted that the specifications required Underwriters' Laboratories' approval of the underwater lights, no matter whose they were, and that he asked the Government to waive only the underwriters' approval requirement, only in connection with the Crouse-Hinds lights. No waiver was requested by Aster for the specification requirement for the adjustable reflectors, but fixed reflector type fixtures were installed anyway.

Page 386—Jay Aster, when asked, "Did you ever get a release from all responsibility as related to this equipment?" stated "No, I never did get an all-inclusive release of that type."

Page 298—Jay Aster testified "I intended to complete the entire job as quickly as possible."

Page 299—"I gave Benjamin Electric the contract on their own terms"—testified Jay Aster.

Page 297—Jay Aster testified "We bought some of the material that was required for the job."

Index digest, Decisions of the Comptroller General 7-1-46 to 6-30-51 U. S. General Accounting Office

I *Paragraph 6, page 63*

Deviations from advertised specifications

Deviations in bid from advertised specifications relative to design, parts, and delivery date of articles bid upon go to substance of bid by affecting either price, quantity or quality of articles so as to be prejudicial to rights of other bidders, and therefore such deviations may not be waived as mere bid informalities in considering bid for acceptance. 20 C.G.4, amplified 30:179.

VI 3. *Bidder's liability generally upon acceptance.*

Contractor who, prior to submission of bid, which was accepted by the government, negligently failed to familiar-

ize itself with specifications and was for that reason unable to furnish suitable material of grade required must bear consequences of its negligence. 30:509

XXXII 5. *Government Agents' authority in general.*

When right to performance of contract strictly in accordance with contract terms is vested in government, no officer or employee has authority to modify such terms except in interests of government. 26:280

(Note: Under constitutional law the protection of the public health and regulations in the interest of public safety are proper and important exercises of the police power, which cannot be delegated or bargained away. The waiver of 1 March 1957 of the safety requirements of the Dept. of the Army by Lt. Williams, was issued without authority and is not binding upon the Government.)

Page 205

XLI 2. *Mistake of fact.*

Mistake as to existing situation which leads either one or both parties to enter into contract which they would not have entered into had they been advised of actual facts will not justify reformation of contract. 26:744

By Comptroller General decision No. B-89692, Nov. 4, 1949, the Government was held entitled to a reduction in contract price, by the amount of the cost of inspection not performed, as the bidder is presumed to include the cost of the specified inspection in his bid.

The National Surety Corporation was notified April 6, 1957, April 16, 1957, April 27, 1957, and May 26, 1958 that the main feeder cables had been installed contrary to specifications, and that Wingate was intending to violate Federal

laws and Federal safety requirements. (Note: The RH-RW main feeder cables installed, do not meet page 26-18 of the specifications.) See exhibits attached.

Miller and Guertler, of Crouse-Hinds, and Aster of Wingate and his attorney, J. Lieberman, all admitted that the Crouse-Hinds lights installed at the pool do not meet the plans and specification requirements as to testing and adjustability, and that this was known to them prior to the installation of the underwater lights. Yet as of July 10, 1958 the financial records of the Corps of Engineers in Philadelphia show that Wingate collected $231,217.83 for its work.

How was the U. S. Government induced to make payments to Wingate as of July 10, 1958 in the amount of $231,217.83?

(a) May 23, 1957, Wingate terminated the contract at the Jack Aloff Company for the installation of the underwater pool lights.

(b) May 24, 1957, Crouse-Hinds wrote a letter to Jay Aster, said letter stating in part "In reference to your telephone conversation with me this morning, please be advised that the 12 R. P. S. swimming pool lights, catalogue No. 44133-C, that we furnished to our distributor, Franklin Company, who received an order from Jack Aloff Company for this material for installation at McGuire Air Force Base swimming pool, are in accordance with the Corps of Engineers' specifications . . ."

(c) May 28, 1957: Graybar Electric Company of Philadelphia picked up one Crouse-Hinds swimming pool light from the Jack Aloff Co., and receipted for same.

(d) May 29, 1957: M. Benjamin and H. Benjamin of the Benjamin Electric Company of Philadelphia, W. Guertler of Crouse-Hinds and P. J. Hickey of Wingate visited

Lt. R. Williams at McGuire Air Force Base, at which time Lt. Williams noted his approval on a copy of a letter from Crouse-Hinds to Jay Aster. Also on this occasion M. Benjamin promised to have an electrical foreman on the job to start work and to deliver 12 underwater pool floodlights to the job the same day. (See Wingate daily progress report dated May 29, 1957.)

(e) June 4, 1957: The Jack Aloff Company was directed to return 11 Crouse-Hinds underwater lights to the Franklin Electric Company. The Franklin Electric Co. issued a receipt to the Jack Aloff Co. for eleven Crouse-Hinds underwater lights. The receipt states "reason for Return: WRONG MATERIAL."

(f) Nov. 25, 1957: Mr. Guertler of Crouse-Hinds testified that the lights that had been shipped by Crouse-Hinds to Aloff are the lights in place in the wall of the swimming pool. See pages 123, 124, 125, of the notes of testimony.

(g) Dec. 2, 1957: Jay Aster testified that the actual electrical work was performed by two electrical contractors, the Benjamin Electric Company and the MaGuire Engineering Company. See notes of testimony, page 297.

(h) Dec. 9, 1957: Pages 356 and 357 of the notes of testimony—Jay Aster testified that he periodically sent letters to the Government setting forth the work done at various times, in consequence of which he received government payment estimates.

As of July 10, 1958 the U S. Government was induced by said periodic letters to the government to pay out to Wingate the total sum of $231,217.83.

Further actions and declarations in aid, promotion, and furtherance of the collection by Wingate of money from the government for the *construction of the swimming pool in violation of the contract specifications.*

(a) Allan Morton Levick, 7812 Oak Lane Road, Cheltenham, Pa., pages 295, 296. Show that Levick certified a statement as to the expenses incurred by Wingate, and that said expenses were incurred for work performed according to plans and specifications.

(b) Jay Aster and his attorney, Joseph H. Lieberman, certified to the U. S. District Court in Philadelphia on Sept. 22, 1958 that all of the facts set forth in "Exhibit A" are true and correct. However pages 192, 193, 194, and 195 of the notes of testimony along with letter from Loen Webster Melcher, examiner of Questioned Writings and Documents, dated Nov. 26, 1957, proves "Exhibit A" to be a forgery.

(c) George I. Lovatt, J. Johnstone Muir, and Frank M. Steinberg, with full knowledge of admitted forgery and fraud on the government as revealed in pages 192 to 430 inclusive, of the notes of testimony, signed "Exhibit C", submitted to the U. S. District Court on Sept. 22, 1956 by Wingate, said exhibit stating in part "This testimony was transcribed by the court stenographer and consisted of approximately one hundred and ninety pages."

Decision shown to Government to justify release of funds to Aster—see page 11a--for conspiracy of

Other Government swimming pools affected by the installation of Crouse-Hinds underwater lights.

In the letter dated May 24, 1957 from Crouse-Hinds to Jay Aster, Crouse-Hinds indicated that they had furnished their underwater lights to other government swimming pools.

Benjamin Steinberg, George I. Lovatt and J. Johnstone Muir, with full knowledge of admitted forgery (page 192 of the notes of testimony), misrepresentation of material to the government (pages 288, 289, 295, 296, 297, 298, 299, 379, 390, daily progress report. Mr. Steinberg's statement page 101, 289, 356, perjury 262, 289, 364).

My records indicate that the pool at Dover Air Force Base and the enlisted men's swimming pool at McGuire Air

Force Base were also equipped with the Crouse-Hinds underwater lights.

Since the Crouse-Hinds Drawing Number 934-GH18 and the records in this action show that Crouse-Hinds made annual changes to its underwater lights without the approval of the General Services Administration, National Bureau of Standards, or the Underwriters' Laboratories, Inc., as required, the U. S. Government is entitled to recovery of penalty and damages in connection with the construction of the other swimming pools equipped by contractors with the untested Crouse-Hinds underwater lights.

Sept. 25, 1958—at deposition, when confronted with act of filing forged document in a federal court, Lieberman shouted at me "You are the dirtiest, rottinest person I have ever had to do business with."

EXHIBIT D.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,970.

THE UNITED STATES OF AMERICA
and JACK ALOFF,

Appellant,

v.

JAY ASTER, Individually and Trading as WINGATE CONSTRUCTION CO., NATIONAL SURETY CORPORATION and THE CROUSE-HINDS CO.

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

The papers submitted by appellant, Jack Aloff, are accepted as a petition for rehearing and, under the circumstances, as within time. The petition for rehearing is denied.

By the Court,
McLAUGHLIN
Circuit Judge.

Dated: June 16, 1960

EXHIBIT E.

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C. atd

GCD:JNF
46-62-403
Mr. Jack Aloff
1381 Farrington Road
Philadelphia 31, Pennsylvania

Re: United States ex rel Jack Aloff v. Jay Aster d/b/a Wingate Construction Company, et al.
E. D. Pa., Civil No. 25307

Dear Mr. Aloff:

Enclosed is a copy of the disclosure you submitted to us, pursuant to Section 231 and 232 Title 31 of the United States Code. While your handwritten disclosure was for the most part legible, there may be a few minor errors in this copy. As indicated the disclosure satisfies the jurisdictional requirements of the statute and apprises us of the nature of your contentions.

Under separate cover we are returning the documentary evidence submitted in support of your allegations.

Please be advised that we are evaluating the evidence in this case, and while we have sixty days from the date the disclosure was submitted, to decide whether or not to take over prosecution of this case, we will notify you promptly when we reach a decision in this matter.

Yours very truly,

GEORGE COCHRAN DOUB
Assistant Attorney General
Civil Division
By: /s/ Frederick N. Curley
Frederick N. Curley
Chief, Frauds Section

Enclosure

EXHIBIT F.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HKW/CMD/rk
File No. 48071

THE UNITED STATES OF AMERICA and JACK ALOFF (Informant) v. JAY ASTER, Ind. and T/A THE WINGATE CONSTRUCTION COMPANY, THE NATIONAL SURETY CORPORATION and THE CROUSE-HINDS COMPANY	Civil Action No. 25207 (Filed: December 8, 1958)

STATEMENT TO THE COURT

AND NOW, to wit, this 8th day of December, 1958, comes the United States of America by its attorneys HAROLD K. WOOD, United States Attorney in and for the Eastern District of Pennsylvania, and CHARLES M. DONNELLY, Assistant United States Attorney for said District, who, after a thorough investigation of the facts in the above entitled matter, decline to enter the action under the authority contained in the provisions of 31 U. S. C. §232(C).

/s/ Harold K. Wood
HAROLD K. WOOD
United States Attorney

/s/ Charles M. Donnelly
CHARLES M. DONNELLY
Assistant United States Attorney